

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-95 OF 1998
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND HASHIM YUSOFF
JJCA
24 NOVEMBER 2005

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Revenue Law — Income tax — Assessment — Benefit plan provided by employer — Discretionary payment of benefit plan — Whether form part of adjusted income and attract tax — Income Tax Act 1967 s 33(1)

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Words and Phrases — Definitions — ‘Expenses wholly and exclusively incurred’ — Income Tax Act 1967 s 33(1)

This case turned on the interpretation to be given to the opening words of s 33(1) of the Income Tax Act 1967 (‘the Act’). The appellant taxpayer constituted a benefit plan for its employees. An employee will receive a lump sum payment when he or she retires or resigns or on his or her termination from service other than a termination for cause. The fund for this benefit plan was financed and administered entirely by the appellant. The employees made no financial contribution to that fund and there was no separate fund to which the employees make contributions. But there were conditions to be satisfied for an employee to receive this benefit. He or she must have served the appellant for at least 11 years. Once that condition was satisfied, the employee was regarded as having an accrued or vested right to receive the benefit. However, an employee who has served 11 years would not receive any benefit if he or she is terminated for cause. But the appellant as employer had a discretion whether to make any payment to such an employee. The appellant sought to deduct the monies set aside for this plan from its income. The Inland Revenue Board did not agree. It said that the important words in s 33(1) of the Act were ‘expenses wholly and exclusively incurred’. In other words, it must be money actually spent. The benefit plan was in respect of monies that were never ‘incurred’. They were there to meet a mere contingency. So they form part of the adjusted income and attract tax. The appellant appealed to the Special Commissioners. They held against the appellant. The appellant then appealed to the High Court which also found against it. Hence this appeal.

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Held, allowing the appeal:

- (1) The words ‘expenses wholly and exclusively incurred’ appearing in s 33(1) of the Act include a sum which the taxpayer is under an obligation to pay. That is the proposition established by *Commissioner for Inland Revenue v Lo & Lo* [1984] 1 WLR 986. Being a Privy Council decision from another jurisdiction on a provision that is materially similar to our written law, it must be given great weight (see para 8).

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- A (2) The fact that the appellant's employees did not actually receive the money in a given year did not matter. For, had any of those who were eligible to receive the benefit claimed it, then it would have been impossible for the appellant to have lawfully resisted the claim. The fact that the employees thought it fit not to make a claim but to defer it did not make the obligation to pay an expense that was incurred by the appellant non-existent (see para 9).
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- C (3) The principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally (see para 10); *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 followed.

D **[Bahasa Malaysia summary]**

E Ini adalah berkaitan pentafsiran yang diberikan untuk kata pembuka s 33(1) Akta Pendapatan Cukai 1967 ('Akta tersebut'). Perayu pembayar cukai membentuk satu plan faedah untuk pekerjaannya. Seorang pekerja akan menerima bayaran sekaligus apabila beliau bersara atau berhenti bekerja atau tamat perkhidmatannya selain daripada penamatan dengan sebab. Dana untuk plan faedah ini dibiayai dan ditadbir sepenuhnya oleh perayu. Para pekerja tidak membuat sumbangan kewangan kepada dana tersebut dan tiada dana berasingan yang mana pekerja membuat sumbangan itu. Namun terdapat syarat-syarat yang perlu dipenuhi untuk seorang pekerja itu layak menerima faedah ini. Pekerja itu hendaklah telah berkhidmat dengan perayu sekurang-kurangnya 11 tahun. Setelah syarat ini dipenuhi, pekerja itu dianggap telah mengakru atau diberikan hak untuk menerima faedah itu. Bagaimanapun, seorang pekerja yang telah berkhidmat selama 11 tahun tidak akan menerima apa-apa faedah jika beliau ditamatkan atas sebab tertentu. Namun perayu sebagai majikan mempunyai budi bicara sama ada untuk membuat apa-apa bayaran kepada pekerja berkaitan. Perayu memohon untuk memotong wang yang diketepikan untuk plan ini daripada pendapatannya. Jabatan Hasil Dalam Negeri tidak bersetuju. Ia berkata bahawa perkataan-perkataan penting dalam s 33(1) Akta tersebut adalah 'expenses wholly and exclusively incurred'. Dalam perkataan lain, wang itu hendaklah yang telahpun dibelanjakan. Plan faedah adalah berkaitan wang yang tidak pernah 'incurred'. Ia suatu yang di luar jangkaan. Jadi ia membentuk sebahagian daripada pendapatan yang telah dilaraskan dan patut dikenakan cukai. Perayu telah membuat rayuan kepada Pesuruhjaya Khas. Ia memutuskan terhadap perayu. Perayu kemudiannya telah merayu ke Mahkamah Tinggi yang juga mendapati terhadapnya. Justeru itu rayuan ini dibuat.

I **Diputuskan**, membenarkan rayuan tersebut:

- (1) Perkataan-perkataan 'expenses wholly and exclusively incurred' yang terdapat dalam s 33(1) Akta tersebut termasuklah sejumlah wang yang pembayar cukai adalah di bawah tanggungjawab untuk membayar. Ini adalah saranan yang

dikemukakan oleh *Commissioner for Inland Revenue v Lo & Lo* [1984] 1 WLR 986. Memandangkan oa adalah keputusan Majlis Privi daripada bidang kuasa lain berhubung suatu peruntukan yang hampir sama dengan undang-undang bertulis di Malaysia, ia hendaklah diberikan penekanan (lihat perenggan 8).

- (2) Hakikat bahawa pekerja perayu tidak menerima wang dalam tahun yang diberikan tidak menjadi hal. Sebab, jika adapun yang layak untuk menerima faedah itu menuntutnya, maka ia adalah mustahil untuk perayu menyekat tuntutan itu secara sah. Hakikat bahawa pekerja-pekerja tersebut fikir ia tidak sesuai untuk membuat tuntutan tetapi menangguh tuntutan mereka, tidak menjadikan tanggungjawab untuk membayar wang yang ditanggung oleh perayu itu tidak wujud (lihat perenggan 9).

- (3) Prinsip bahawa suatu peruntukan dalam statut percukaian hendaklah dibaca secara ketat adalah suatu yang patut digunakan terhadap jabatan hasil dan bukan menyebelahnya. Maxim dalam undang-undang hasil adalah: tidak ada peruntukan jelas; tidak ada cukai. Jika terdapat keraguan maka ia hendaklah diselesaikan menyebelahi pembayar cukai. Ekoran daripada saranan ini adalah bahagian tersebut dalam statut hasil yang menyebelahi pembayar cukai hendaklah dibaca secara longgar (liberal interpretation) (lihat perenggan 10); *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 diikut.]

Notes

For cases on assessment of income tax, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2072–2095.

Cases referred to

Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 (refd)
Commissioner for Inland Revenue v Lo & Lo [1984] 1 WLR 986 (folld)
Director General of Inland Revenue v Kulim Rubber Plantations Ltd [1981] 1 MLJ 214 (refd)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99 (folld)
Nielsen Development Laboratories Pty Ltd v Federal Commissioner of Taxation 81 ATC 4031 (dstd)
Owen v Southern Railway of Peru Ltd (1954) 36 TC 602 (dstd)

Legislation Referred to

Income Tax Act 1967 s 33(1)
 Inland Revenue Ordinance [HK] s 16(1)

Appeal from: Tax Appeal No R2-14-4 of 1998 (High Court, Kuala Lumpur)

WSW Davidson (*Francis Tan and Lucy Chang with him*) (*Azman Davidson & Co*) for the appellant.
 Hazlina Hussain (*Ashrina Razman Ali with her*) (*Legal Officer, Inland Revenue Board*) for the respondent.

A Gopal Sri Ram JCA (delivering judgment of the court):

B [1] The appellant taxpayer constituted a benefit plan for its employees. This is how the plan works. An employee will receive a lump sum payment when he or she retires or resigns or on his or her termination from service other than a termination for cause. So if an employee is dismissed for misconduct he or she will not receive anything from the benefit plan. The fund for this benefit plan is financed and administered entirely by the appellant. The employees make no financial contribution to that fund and there is no separate fund to which the employees make contributions. But there are conditions to be satisfied for an employee to receive this benefit. He or she must have served the appellant for at least 11 years. Once that condition is satisfied, the employee is regarded as having an accrued or vested right to receive the benefit. However, an employee who has served 11 years will not receive any benefit if he or she is terminated for cause. But the appellant as employer has a discretion whether to make any payment to such an employee. So much for the plan.

D [2] Now, the appellant sought to deduct the monies set aside for this plan from its income. Revenue did not agree. It said that the money for the plan was a chargeable gain. It refused to allow the deduction from the assessments raised against the appellant. The appellant appealed to the Special Commissioners. They held against the appellant. The appellant then appealed to the High Court which also found against it. And so the appellant has come before us.

E [3] This case turns on the interpretation to be given to the opening words of s 33(1) of the Income Tax Act 1967 ('the Act'). These are the words of that provision: **F** and I have placed emphasis on the relevant phrase:

G Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and *expenses wholly and exclusively incurred* during that period by that person in the production of gross income from that source... (Emphasis added.)

H [4] Revenue's argument is simple enough. It says that the important words in s 33(1) are 'expenses wholly and exclusively incurred'. In other words, it must be money actually spent. The benefit plan is in respect of monies that are never 'incurred'. They are there to meet a mere contingency. So they form part of the adjusted income and attract tax.

I [5] The appellant relies on *Commissioner for Inland Revenue v Lo & Lo* [1984] 1 WLR 986. It is a decision of the Privy Council. It turned on the interpretation of s 16(1) of the Inland Revenue Ordinance of Hong Kong. The relevant part of that section reads:

(1) In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are *incurred* during the basis period for that year of assessment by such

person in the production of profits in respect of which he is chargeable to tax under this Part for any period, including ... (Emphasis added.)

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[6] The facts in *Lo & Lo* were these. Lo & Lo were a long established firm of solicitors and notaries practising in Hong Kong. In 1977, the firm introduced a condition of employment whereby a retiring member of its staff, who had completed 10 years of service, would become entitled to a lump sum payment roughly equivalent to 1/24 of his annual salary as at the date of retirement for each year of service. The Commissioner of Inland Revenue contended that the accrued liability of the firm to pay its staff was not an expense 'incurred' within the meaning of s 16 of the Hong Kong Ordinance. The Board of Review (the equivalent of our Special Commissioners) held for the Commissioner. The High Court reversed and the Court of Appeal upheld the reversal. The Commissioner then appealed to the Privy Council which affirmed the courts below. Lord Brightman who delivered the Advice of the Board said this:

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For reasons already given, 'an expense incurred' is not confined to a disbursement, and must at least include a sum which there is an obligation to pay, that is to say an accrued liability which is undischarged. Their Lordships then ask themselves why the \$50,000 in the example given is not to be considered a sufficiently accrued liability in the year 1977 to be admissible as an 'expense incurred' in that year within the meaning of the section? The only argument could be that the employee has not seen fit to exercise his right to demand payment, and that he might forfeit such right through misconduct. Neither element in the opinion of their Lordships is sufficient to disqualify the \$50,000 as an 'expense incurred', given that such expression is not confined to a disbursement. The employee had a choice whether to receive payment of \$50,000 on 31 December 1977 or to defer receipt of such payment to a later date. The firm could not resist the obligation to make such payment on 31 December 1977 if the employee chose to take the appropriate steps to demand it. Their Lordships consider that in such circumstances it would be placing an unduly narrow construction on s 16 to deny such \$50,000 the description of 'an expense incurred during the year 1977'. Their Lordships are therefore of the opinion that, on a proper construction of s 16, the sum of \$770,000, being the amount which long service employees could at the close of the year 1977 have demanded on retirement, was an expense incurred during that year.

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[7] Learned counsel for revenue submits that *Lo & Lo* is distinguishable because of the difference in the actual wording of s 16 of the Hong Kong Ordinance. It is also submitted that s 33(1), being a taxing statute, should be given a strict construction and hence the words 'expenses wholly and exclusively incurred' should receive a narrow interpretation. The oft quoted judgment of Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 was prayed in aid of this submission. With respect, I am unable to agree with these arguments.

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[8] In the first place, the words 'expenses wholly and exclusively incurred' appearing in s 33(1) include a sum which the taxpayer is under an obligation to pay. That is the proposition established by *Lo & Lo*. Being a Privy Council decision from another jurisdiction on a provision that is materially similar to our written law, it must be given great weight. Here, I can do no better than to refer to the following passage in the judgment of Chang Min Tat FJ in *Director General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214:

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- A This court has laid down in *Khalid Panjang & Ors v Public Prosecutor (No 2)* [1964] MLJ 108 the principle that *a Privy Council decision on appeal from another country is binding on it and the other courts of this country if the appeal is on a provision of law in pari materia with a provision of the local law*. The decision in *Lasala v Lasala* [1979] 2 All ER 1146, that the Privy Council would consider itself bound by a decision of the House of Lords must extend
- B in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as per incuriam. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them. (Emphasis added.)
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- D [9] In the second place, the fact that the appellant's employees did not actually receive the money in a given year does not matter. For, had any of those who were eligible to receive the benefit claimed it, then it would have been impossible for the appellant to have lawfully resisted the claim. The fact that the employees thought it fit not to make a claim but to defer it does not make the obligation to pay an expense that is incurred by the appellant non-existent. Accordingly it comes within what revenue lawyers commonly call 'the basket' in s 33.
- E [10] In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99). The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must
- F be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.
- G [11] In the fourth place, the two authorities relied on by learned counsel for revenue are readily distinguishable. The first is *Owen v Southern Railway of Peru Ltd* (1954) 36 TC 602. In that case, the taxpayer operated a railway in Peru under a statutory scheme by virtue of which its employees were entitled to receive from it a lump sum payment on retirement, death or other termination of service. Unlike *Lo & Lo* and the present instance, entitlement did not depend on any prescribed length of service. The amount of the benefit, none of which was payable until service with the appellant had been terminated, was arrived at by taking a prescribed portion of
- H the salary of the closing year of employment and multiplying it by the number of years of service. On those facts, Lord Radcliffe expressed the view that but for the findings of the Special Commissioners in that case about accounting practice, the taxpayer would have been liable to tax. But that was a case of a statutory scheme. It was not a contractual obligation voluntarily undertaken by the taxpayer. Lord
- I Radcliffe recognised the importance of this difference, for I find him saying this:
- Secondly, it must not be forgotten that these benefits and their scale are imposed by legislation, *not by voluntary contract*; and one cannot exclude the possibility that both the form and the scale of what has to be paid may be altered again without the appellant's consent. (Emphasis added.)

[12] Next there is *Nielsen Development Laboratories Pty Ltd v Federal Commissioner of Taxation* 81 ATC 4031 . That case bears no resemblance to the present instance. It had to do with the question whether the taxpayer could deduct as expenses, provision made for its employees long service leave and annual leave even before an employee had actually gone on leave. On those very different facts, the High Court of Australia held that there could be no deduction until the employee concerned actually entered upon the appropriate leave. The case therefore does not assist revenue.

[13] For the reasons already given, I am of the view that the Special Commissioners and the High Court erred in holding against the appellant. The appeal must be allowed and the orders in the High Court and the deciding order of the Special Commissioners must be set aside. The relevant assessments imposed on the appellant are hereby discharged. The costs in this Court and in the court below must be borne by the respondent. The deposit in court shall be refunded to the appellant.

[14] My learned brothers Abdul Kadir Sulaiman JCA (now FCJ) and Hashim Yusoff JCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Sally Kee

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